

REMARKS

Reconsideration of the application in light of the following remarks is respectfully requested.

Status of the Claims

Claims 1 to 24 were previously cancelled without prejudice or disclaimer.

Claims 25 to 55 are pending and at issue and are presented as a courtesy to the Examiner.

Rejection under 35 U.S.C. §102(e) based on Toyoshima

Claims 25 to 41 and 44 to 55 were rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent Publication 2004/0044753 to Toyoshima et al. (“Toyoshima”).

The present application is a U.S. National Stage Application under 35 U.S.C. §371 of PCT International Application No. PCT/DE2003/00539, filed February 21, 2003, which claims priority to German Patent Application No. DE 102 39 686.8, filed March 12, 2002 (“German Patent Application”).

Toyoshima has a filing date of February 27, 2002. The Final Office Action relies on Toyoshima as a prior art reference under 35 U.S.C. § 102(e). Applicants disagree that Toyoshima discloses all the features for which it is relied upon in the Final Office Action. Nevertheless, Applicants respectfully traverse this rejection by submitting herewith a Declaration of Prior Invention under 37 C.F.R. § 1.131 (“Declaration Under 37 C.F.R. § 1.131”), along with documentary evidence in the form of Exhibits A, B and C. The Declaration and its attachments provide documentary evidence that Applicants’ date of conception of the presently claimed invention antedates Toyoshima. The Declaration further states that due diligence was used prior

to February 27, 2002, the date of Toyoshima, through to the constructive reduction to practice of the invention by the filing of the German Patent Application, filed March 12, 2002.

Thus, Applicants submit that the presently claimed invention was conceived prior to the February 27, 2002 effective filing date of Toyoshima and that Applicants continued to diligently work on the subject matter disclosed therein until the German Patent Application was filed on March 12, 2002. Thus, the claimed invention of this application antedates Toyoshima, such that it is not prior art.

Applicants respectfully traverse this rejection and request that the 35 U.S.C. § 102(e) rejection of claims 25 to 41 and 44 to 55, based on Toyoshima as a prior art reference under 35 U.S.C. § 102(e), be withdrawn.

Rejection under 35 U.S.C. §102(e) based on Cruickshank

Claims 25, 36, 37, and 39 to 44 were rejected under 35 U.S.C. §102(e) as being anticipated by U.S. Patent Publication 2003/0126256 to Cruickshank III et al. (“Cruickshank”).

Independent claim 25 of the present application recites “sending measurement packets with an adjustable distribution in time so as to determine first status information.” It is respectfully submitted that Cruickshank does not teach this feature of claim 25.

The Final Office Action, at page 10, cites to paragraph [0047] of Cruickshank as disclosing the aforementioned feature of claim 25. Applicants respectfully disagree. Paragraph [0045] of Cruickshank, as noted in the Final Office Action at page 10, states that “[t]he sample intervals apply to the intervals for which the data are collected” and that “[s]ome of the data for the calculation may be collected at slower rates than other data.” Clearly, Cruickshank describes

collecting data over a sample interval. In other words, Cruickshank describes variation in the *rate* at which *data* is collected, or taken. Cruickshank does not teach *sending measurement packets* with an adjustable distribution in time, as recited in claim 25. The feature of sending measurement packets with an adjustable distribution in time, as recited in claim 25, is described in paragraph [0047] of the Specification of the present application, which states that “measurement packets are sent from first measuring computer 28 to second measuring computer 30 with an adjustable distribution in time (for example, a constant or exponential distribution).” Thus, the description in Cruickshank of collecting data over a sample interval does not teach sending measurement packets with an adjustable distribution in time as recited in claim 25.

The Advisory Action dated December 18, 2007 maintains that “the so called distribution is an act of sending measured data from a first device to a second device, which is functionally equivalent to collecting.” Again, Applicants respectfully disagree. It is respectfully submitted that sending data is not the functional equivalent of collecting data, nor would a person of ordinary skill in the art understand sending to be the same as collecting. Specifically, as more fully set forth above, the description in Cruickshank of collecting data over a sample interval does not teach sending measurement packets with an adjustable distribution in time as recited in claim 25. Because Cruickshank fails to teach at least the above-recited feature of claim 25, it cannot anticipate claim 25 or any of its dependent claims.

Reconsideration and withdrawal of the rejection of claims 25, 36, 37, and 39 to 44 under 35 U.S.C. §102(e) based on Cruickshank is respectfully requested.

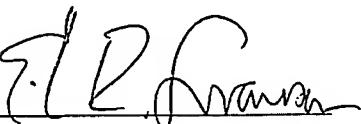
CONCLUSION

Each and every point raised in the Final Office Action dated August 29, 2007 has been addressed on the basis of the above remarks. In view of the foregoing it is believed that claims 25 to 55 are in condition for allowance and it is respectfully requested that the application be reconsidered and that all pending claims be allowed and the case passed to issue.

If there are any other issues remaining which the Examiner believes could be resolved through a Supplemental Response or an Examiner's Amendment, the Examiner is respectfully requested to contact the undersigned at the telephone number indicated below.

Dated: January 29, 2008

Respectfully submitted,

By 

Erik R. Swanson
Registration No.: 40,833
DARBY & DARBY P.C.
P.O. Box 770
Church Street Station
New York, New York 10008-0770
(212) 527-7700
(212) 527-7701 (Fax)
Attorneys/Agents For Applicant

Attachment: Declaration under 37 C.F.R. § 1.131 with accompanying Exhibits A, B and C
(31 pages total)